

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-961

JOANNA HURIER

vs.

AUTUMN HURIER.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Autumn Hurier and Joanna Hurier¹ were divorced in May of 2015, pursuant to a divorce judgment providing, as relevant here, that (1) the parties would have shared legal custody of their two children; (2) the children would live primarily with Joanna; and (3) Autumn would have parenting time on certain weeknights and every other weekend according to a "rotating four week schedule." On November 9, 2017, a judge of the Probate and Family Court issued a modification judgment, which is the subject of this appeal brought by Autumn, awarding sole legal custody of the children to Joanna and ordering supervised parenting time for Autumn.² We conclude that the judge properly

¹ Because the parties share a surname, we use first names to avoid confusion.

² The judge also ordered that (1) Autumn shall re-enroll and complete either the Emerge program or its reasonable equivalent

found that a material and substantial change in the circumstances of the parties had occurred and that the judgment of modification was necessary in the best interests of the children. See G. L. c. 208, § 28. Accordingly, we affirm.

Background. In December of 2015, Joanna obtained an abuse prevention order pursuant to G. L. c. 209A against Autumn. The order was in place in January of 2016, when Joanna filed a complaint for modification seeking sole legal custody of the children and supervised parenting time for Autumn. As the relevant material change in circumstances, Joanna alleged that Autumn had made "threats" and "inappropriate statements" to the children, the children were covered by the c. 209A order, and the existing parenting plan was no longer in the children's best interests. The parties agreed to a temporary parenting schedule, under which Autumn would have supervised parenting time with the children for two hours every other week.

Following a two-day trial at which the guardian ad litem (GAL), the visitation supervisor, Autumn, and Joanna testified, the judge issued the modification judgment. As previously noted, the judge granted (1) sole legal custody to Joanna, and (2) a maximum of four hours of supervised parenting time every other week to Autumn. With respect to Autumn's parenting time,

and remain in individual therapy; and (2) the children shall remain in therapy.

the judge found there had been significant conflict between Autumn and the children, and the children had refused to attend parenting time with Autumn on multiple occasions.³ In reaching his conclusions, the judge implicitly adopted the recommendation of the GAL to continue with supervised parenting time for Autumn. The GAL also recommended that Autumn complete the Emerge program, an anger management program, or its equivalent and noted that Autumn has anger toward Joanna and the oldest son. Autumn did complete the motherhood program offered by the Probate and Family Court and an anger management program. She also voluntarily enrolled in the Emerge program, but withdrew after a few sessions, claiming it did not "fit her needs." A report prepared by two "group leaders" at Emerge, neither of whom testified at trial, was admitted in evidence over Autumn's objection (Emerge report).

With respect to legal custody, the judge found that "effective communication between these parties is not presently possible," as demonstrated by the c. 209A order, and that shared legal custody was not in the children's best interests.

³ The GAL testified that the oldest son is very angry with Autumn and has questions about an incident in which Autumn was restrained and wrestled to the ground by the police. In addition, the visitation supervisor testified that the son made negative statements to Autumn during visits and had arguments with her, and that, on one occasion, both children ran away from Autumn. The visiting supervisor also testified that the older son showed him drawings depicting Autumn with Adolf Hitler.

Discussion. We review custody determinations for an abuse of discretion. Schechter v. Schechter, 88 Mass. App. Ct. 239, 245 (2015). "[A] transfer of custody from one parent to another must be based on some material and substantial change in circumstances since the divorce," and "the change must be of sufficient magnitude to satisfy the governing principle, namely, whether the transfer is in the best interests of the child." Hernandez v. Branciforte, 55 Mass. App. Ct. 212, 220 (2002). See G. L. c. 208, § 28. "In custody matters, the touchstone inquiry [is] . . . what is 'best for the child,'" and "[t]he determination of which parent will promote a child's best interests rests within the discretion of the judge . . . [whose] findings . . . 'must stand unless they are plainly wrong.'" Hunter v. Rose, 463 Mass. 488, 494 (2012), quoting Custody of Kali, 439 Mass. 834, 840, 845 (2003). While there is no "definitive list of criteria" for the judge to consider when assessing the children's best interests, "[certain] constants are revealed in our [cases]," including "the need for stability," "the decision-making capabilities of each parent to address the child's needs, and the living arrangements and lifestyles of each parent and how such circumstances may affect the child" (citation omitted). El Chaar v. Chehab, 78 Mass. App. Ct. 501, 506 (2010). See G. L. c. 208, § 31. "The judge is afforded considerable freedom to identify pertinent factors

in assessing the welfare of the child and weigh them as she sees fit." Smith v. McDonald, 458 Mass. 540, 547 (2010).

Autumn contends that the judge erred by admitting the Emerge report in evidence,⁴ made findings that were unsupported by the evidence at trial, and improperly limited Autumn's parenting time during the pendency of the modification proceedings, which resulted in her strained relationship with the children. We have considered Autumn's claims carefully and conclude that none of the arguments pressed on appeal causes us to question the judge's decision.

First, assuming without deciding that the Emerge report constituted hearsay, it was cumulative of other properly admitted evidence concerning Autumn's anger management issues. Second, our review of the record leads us to conclude that the judge's extensive findings in support of his decision to transfer sole custody to Joanna, the key portions of which we have summarized, are fully supported by the evidence. Finally, Autumn's strained relationship with the children did not stem from the imposition of supervised visitation following the filing of the modification complaint. As the judge found, that

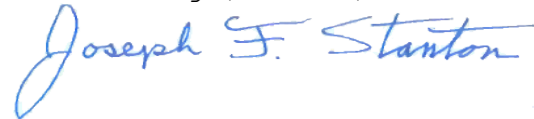
⁴ More specifically, Autumn contends that the report contained conclusory statements regarding her history of abusing the children, her attitude toward her responsibility for the abuse, and her minimization of the seriousness of the abuse.

relationship had deteriorated significantly before the complaint was filed.

Conclusion. The modification judgment dated November 9, 2017, is affirmed.

So ordered.

By the Court (Vuono,
Wolohojian &
McDonough, JJ.⁵),



Clerk

Entered: June 20, 2019.

⁵ The panelists are listed in order of seniority.